Supreme Court, U.S.
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No. 94-78

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v.

KATHLEEN ASHER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondent accepts the facts as stated in Petitioner's "Statement Of The Case" (Petition for Certiorari, pages 7-9).

REASONS FOR DENYING WRIT OF CERTIORARI

Once again, Petitioner attempts to seek a Writ of Certiorari with respect to the decision of the State of Michigan to impose the sanctions of the exclusionary rule for violations of the Michigan "knock and announce" statute, MCL 780.656; MSA 28.1259(6). Petitioner contends that as it did in *People v Polidori*, 190 Mich App 673 (1991), US *cert den* ____ US ____ 121 L Ed 2d 222, 113 S Ct 298 (1992), this Honorable Court should deny Petitioner's request.

The requirement that police officers give notice prior to executing a search warrant authorizing entry into a private residence, dates back to England in 1603, in *Smanyne's Case*.[1] Before an

[1] 5 Coke 91, 77 Eng. Rep. 194 (K.D. 1603).

officer of the Crown could forcibly enter a residence to make an arrest, "he ought to signify the cause of his coming, and to make request to open the doors." Since that date, many jurisdictions including Michigan,[2] have enacted "knock and announce statutes". These statutes typically require that the officer executing the search warrant first announce his identity and purpose prior to forcing entry. In addition to both the common law and knock and announce legislation, this Court has held that absent exigent circumstances, the requirement that police announce their identity and purpose prior to forced entry, is constitutionally mandated by the Fourth Amendments prohibition against unreasonable

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[2]MCL 780.656; MSA 28.1259(6): The officer to whom a warrant is directed, or any person assisting him, may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his authority and purpose, he is refused admittance, or when necessary to liberate himself or any person assisting him in execution of the warrant.

searches and seizures.[3] Similarly, other courts have held that the knock and announce requirement is rooted in Fourth Amendment protections.[4]

While some have referred to the protections of the notice requirements as "somewhat tenuous",[5] several substantial and compelling interests are

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[3]*Gouled v United States*, 255 US 298; 65 L Ed 647; 41 S Ct 261 (1921), (disapproved on other grounds *Warden, Maryland Penitentiary v Hayden*, 357 US 294; 18 L Ed 2d 782; 87 S Ct 1642 (1963); *Ker v California*, 374 US 23; 10 L Ed 2d 726; 83 S Ct 1623 (1963).

[4]"Though each case by itself is less than compelling, their conclusion has been unanimous: The Fourth Amendment forbids the unannounced, forcible entry of a dwelling in the absence of exigent circumstances, *United States v Francis*, 646 F2d 251, 258 (1981); *See also, United States v Valenzuela*, 596 F2d 824, 830 (1979), `As we have recognized in light of *Ker v California*, 374 US 23; 10 L Ed 2d 726; 83 S Ct 1623 (1963), `[i]t is now clear that, to some extent, [the knock-notice requirements of Title 18 USC §3109] have been incorporated into the Fourth Amendment.'"

[5]Sonneneick & Ebner, No-Knock and Nonsense. An Alleged Constitution Problem, 44 St. John's L. Rev. 626, 647 (1970).

served by the rule.[6]

Although a few jurisdictions have grappled with the question of whether the knock and announce requirement is rooted in the Fourth Amendment, for the most part, the requirement has been subjected to a "reasonableness" analysis:

> In the main, however, it seems fair to say, as is commonly assumed in the cases, that these statutes [knock and announce] declare what is ordinarily necessary to conform to the reasonableness requirement of the Amendment.[7]

Thus, the majority of states, as well as federal

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[6]1. It reduces the potential for violence to both the police officers and the occupants of the house into which entry is sought;

2. It guards against the needless destruction of private property; and

3. It symbolizes the respect for individual privacy summarized in the adage that "a man's house is his castle", *United States v Adage Gomez*, 488 F2d 4 (9th Cir. 1973). It also provides an opportunity for a resident to indicate that the premises are mistakenly described in the warrant. Note, Announcement in Police Entries, 80 Yale L.J. 139, 140-142 (1970).

[7]LaFave, A Treatise on the Fourth Amendment, Second Edition (1987), ch. 6, p. 611.

circuits, have held that the protections afforded a resident of a private dwelling against unannounced forced entry are indeed founded in the Fourth Amendment.[8] Petitioner's attempt to relegate violations of the knock and announce statute to something less than constitutionally proscribed is without merit:

> The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given a grudging application. Congress, codifying a tradition embedded in Anglo-American law, had declared in §3109 the reverence of the law for the individual's right of privacy in his

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[8]Title 18 USC, §3109, codifies a tradition embedded in Anglo-American law and declares the reverence which the law attaches to an individual's right of privacy in his house, ***United States v Whitney***, 633 F2d 902 (9th Cir. 1980); There is no dispute that the requirements of §3019 are rooted in constitutional values, ***United States v McConney***, 728 F2d 1195 (9th Cir. 1984); ***United States v Case***, 435 F2d 766 (7th Cir. 1970); ***United States v Murrie***, 534 F2d 695 (6th Cir. 1976); ***United States v Chapman***, 384 F Supp 1232, *aff'd without op* 523 F2d 1054 (5th Cir. 1975).

house.[9]

This Court has repeatedly held that where the Fourth Amendment violation complained of involves the sanctity of one's home rather than some other constitutionally protected area, the courts must remain diligent in their effort to protect against unlawful intrusions.[10]

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[9] ***Miller*** *v* ***United States***, 357 US 301; 78 S Ct 1190; 2 L Ed 2d 1332 (1958).

[10] "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.' That language unequivocally establishes the proposition that '[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" ***Payton*** *v* ***New York***, 445 US, at 589-590; 63 L Ed 2d 639; 100 S Ct 1371 (1980), (quoting ***Silverman*** *v* ***United States***, 365 US 505, 511; 5 L Ed 2d 734; 81 S Ct 679 (1961)). *See also,* ***California*** *v* ***Curaolo***, 476 US 207, 212-213; 90 L Ed 2d 210; 106 S Ct 1809 (1986) ("The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy exceptions are most heightened").

The protection against unannounced forced entries is of course not absolute. Numerous exceptions to the application of the exclusionary rule have been carved out in the context of knocking and announcing presence and purpose. In the event exigent circumstances exist, such as the destruction of evidence, or where the act of announcing presence and purpose would constitute a "useless gesture", the courts have consistently held that technical violations of the statute are "reasonable" under the circumstances and fail to evoke the sanctions of the exclusionary rule.[11] The State of Michigan has also recognized that the rule has its limitations:

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[11] *United States v Mapp*, 476 F2d 67 (2nd Cir. 1973), rapid footsteps away from door; *United States v Rambo*, 789 F2d 1289 (8th Cir. 1986), door slammed on police; *United States v Harris*, 713 F2d 623 (11th Cir. 1983), defendant suspicious of undercover officer; *United States v Metz*, 608 F2d 142 (5th Cir. 1979), possible destruction of evidence.

> We agree that strict compliance with the knock and announce statute may be excused if police officers have a basis to conclude that evidence will be destroyed or lives will be in danger by the delay, ***People v Asher***, Docket No. 158306, Slip. Op., decided February 22, 1994, (unpublished).

Petitioner argues that the issue of "timing" (Petition for Certiorari, at page 10), is not deserving of Fourth Amendment consideration. In other words, once officers announce their authority and purpose, they are free to immediately break down the door, usually with a battering ram, and enter the premises brandishing assault weapons. This appears to make little sense, especially to the terrorized inhabitants who are sleeping in the relative security of their own bed or seated at the kitchen table about to say grace.

If officers are required to inform residents of their authority and purpose prior to forcing entry, it is only "reasonable" that a response time should follow.

This would enable residents to answer the door and avoid having their home forcibly invaded by armed intruders who may have raided the wrong house or have been misled by an informant anxious to curry police favor.

Granted, such a delay may allow for a period of time in which residents seek to destroy evidence or arm themselves. However, where officers detect such a response from within the premises, an immediate entry becomes a "reasonable" one. The lower courts have been fairly liberal with respect to the nature of the activity justifying an immediate entry, *see* fn 11, at page 6.

The Supreme Court for the State of Wisconsin in ***State v Stevens***, 511 NE2d 591 (Wis. 1994) has, by way of majority opinion, held that in searches for "evidence of `drug dealing'", police are neither required to announce their identity and purpose, nor

wait any time before entering a residence should they decide to announce presence and purpose in the first place. Initially, it should be noted that Wisconsin has no statute mandating police to follow the rule of announcing presence and purpose, as does Michigan and the federal circuits. Second, the *Stevens* opinion is limited to situations where the police can demonstrate that the location to be searched is involved in "drug dealing". Third, and equally important, the opinion in *Stevens* constitutes a knee jerk reaction whereby the State of Wisconsin has sacrificed individual rights and liberties in order to increase the ammunition necessary to fight the "war against drugs". As the concurring Justices in *Stevens* pointed out:

> As stated above, the majority offers no justification for its adoption of a blanket rule abandoning the rule of announcement in warrants to search for "evidence of drug dealing," and the only empirical evidence I can find

> undermines the majority's rationale. Indeed, an examination of the federal experience with no-knock warrants and both national and Wisconsin statistics regarding violence against police suggests that little may be gained and much may be lost by abandoning the rule of announcement in cases involving "evidence of drug dealing." Justice Abrahamson, concurring in the result, joined by Chief Justice Heffernan.

Many courts around the country, both state and federal, have refused to approve of a blanket rule which permits unannounced entries by police in drug cases.[12]

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[12] *See, e.g.*, ***United States v Wulferdinger***, 782 F2d 1473, 1476 (9th Cir. 1986); ***United States v Stewart***, 867 F2d 581 (10th Cir. 1989); ***United States v Likas***, 448 F2d 607, 609 (7th Cir. 1971); ***Reynolds v Alabama***, 238 SO2d 557, 559-560 (Ala. Cr. App. 1970); ***Arizona v Bates***, 587 P2d 747, 749 (Ariz. 1978); ***California v Gastelo***, 432 P2d 706, 708 (Cal. 1967); ***Connecticut v Anonymous***, 480 A2d 600, 605 (Conn. Super. Ct. 1984); ***Indiana v Dusch***, 289 NE2d 515, 518 (Ind. 1972); ***Crabtree v State***, 479 NE2d 70, 74 (Ind. App. 1985); ***Illinois v Ouellette***, 401 NE2d 507, 510 (Ill. 1979); ***Massachusetts v Gomes***, 556 NE2d 100, 101-102 (Mass. 1990); ***Massachusetts v Scalise***, 439 NE2d 818, 823 (Mass. 1982); ***State v Matos***, 605 A2d

The elapsed time from announcing authority and purpose to forced entry in this case was estimated to be approximately five (5) seconds. Michigan, as well as other jurisdictions, have interpreted a reasonable time to wait prior to forced entry as the length of time it would take the occupant to reach the door from the farthest room in the house.[13] Numerous decisions have held that a short delay between knocking and announcing and forced entry will not suffice.[14]

223, 224 (N.H. 1992); *State v Sundel*, 402 A2d 585, 588 (R.I. 1979); *Rhode Island v Carufel*, 314 A2d 144, 148 (R.I. 1974); *Heaton v Virginia*, 207 SE2d 829, 831 (Va. 1974); *Washington v Ieter*, 634 P2d 312, 314 (Wash. 1981).

Professor LaFave does not favor a blanket rule. See 2 LaFave, Search and Seizure, at 280-84 (2d ed. 1987).

[13] *People v Harvey*, 38 Mich App 39; 195 NW2d 773 (1972).

[14] *State v Bates*, 120 Ariz 561; 587 P2d 747 (1978), 3 to 5 second delay unreasonable; *People v Hirsch*, 71 Cal. App 3d 987; 140 Cal. Rptr. 13 (1977), 5 second delay

If the Fourth Amendment prohibits an unannounced forced entry, then the elapsed time from announcement to entry must also be "reasonable". It would hardly be appropriate to require police to announce their presence and purpose and then permit them to simultaneously force entry. Absent some exigent circumstance, a citizen must be given the opportunity to answer the door to his residence before armed intruders forcibly enter same. This should be true whether police have probable cause to search for drugs or any other type of contraband. It has become politically fashionable to increase the tools with which police

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unreasonable; ***Commonwealth v Manni***, 398 Mass 741; 500 NE2d 807 (1986), simultaneous entry unreasonable; ***United States v Pratter***, 465 F2d 227 (7th Cir. 1972), 10 to 15 second delay unreasonable; ***Munoy v United States***, 325 F2d 23 (9th Cir. 1963), practically instantaneously entry unreasonable; ***United States v DeLutis***, 722 F2d 902 (1st Cir. 1983), 20 seconds deemed adequate; ***Commonwealth v Stanley***, 498 Pa 326; 446 A2d 583 (1982), 20 second delay unreasonable.

officers can investigate criminal activity. There can be no question that society needs effective law enforcement, especially in the area of drug trafficking. However, we should keep in mind the language of Justice Marshall in ***Skinner v Railway Labor Executive Association***, 489 US 602, 635, 103 L Ed 2d 639, 109 S Ct 1402 (1989), where he stated:

> "History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem to extravagant to endure. . . . [W]hen we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it."

Subjecting residents of a household, both adults and children, to either an unannounced or immediate forced entry, absent exigent circumstances, notwithstanding the potential for destruction of evidence or danger to police, can ill be afforded.

CONCLUSION

WHEREFORE, Respondent prays that this Court deny plenary review, and affirm the holding of the Michigan Court of Appeals.

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APPENDICES

Respondent is satisfied with Appendix "A", "B" and "C", as set forth in the Petition For A Writ Of Certiorari, filed by Petitioner.